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IN THE

Supreme Court of the United States

October Term, 1969

No. 1488

CARLOS MARCELLO,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals, Fifth Circuit

PETITION FOR REHEARING ON DENIAL OF CERTIORARI

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, Carlos Marcello, prays that this Court grant a rehearing of its order of June 15, 1970, denying petition for a writ of certiorari.

REASONS FOR GRANTING THE REHEARING AND ISSUING THE WRIT

In applying for a rehearing of the denial of certiorari here, petitioner finds no problem in presenting new

matter, not previously urged. In order to present these issues properly we quote from the opinion of the United States Court of Appeals for the Fifth Circuit, relative to the facts of this case.

> "On September 30, 1966, Carlos Marcello arrived at the New Orleans airport where, because of his reputation as a mafia boss, he was immediately surrounded by newspapermen and photographers. Among this group was F.B.I. agent Patrick Collins, posing as a deplaning passenger, and his co-agent photographer whose job it was to keep an eye on Marcello. This crowd followed Marcello through the airport and onto the upper ramp outside where Marcello, angrily and with some profanity, inquired whether the photographers had taken enough pictures.
>
> Collins, with arms folded, answered in the negative, and Marcello retorted: 'Are you looking for trouble?' which elicited the not unexpected reply from Collins that 'I can handle trouble.' This exchange had an unsettling effect on Marcello who took a couple of short jabs at Collins and attempted to mow him down with a haymaker which never really got off the ground because of his brother Joseph's restraint."

While we cannot agree that the evidence supports this summation of events, we can accept this interpretation by the Fifth Circuit for the purpose of this peti-

tion to establish a single fact, and one which the government does not contest: Carlos Marcello did not know Patrick Collins was a Federal Agent, and Collins deliberately and with intention made no effort to convey this information to Marcello. In fact, Collins withheld it from him.

Marcello was indicted for forcibly assaulting and intimidating an Officer of the F.B.I. in violation of 18 U.S.C.A. 111, which provides:

> "Whoever forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in Section 1114 of this title while engaged in or on account of the performance of his official duties, shall be fined not more than $5,000.00 or imprisonment not more than three years, or both.
>
> Whoever, in the commission of any such acts uses a deadly or dangerous weapon, shall be fined not more than $10,000.00 or imprisoned not more than ten years, or both."

The District Court refused to charge the jury that knowledge that Patrick J. Collins was an F.B.I. agent engaged in the performance of his duties was an element of the offense. Petitioner raised the issue on appeal before the Fifth Circuit, in his application for a rehearing, and in the petition for a writ of certiorari in this Court, wherein it was shown that there is a split in the various Circuits on this point, and that the view

of the District and Circuit Court in this case is in direct conflict with the decision of this Court in *Pettibone v. United States*, 148 U.S. 197 (1892).

In *Pettibone*, this Court made clear that knowledge was an essential element of the statute involved therein. The defendant must know that the offense was being committed against a federal officer in the performance of his duty.

THE REBELLIOUS CIRCUITS

In *Bennett v. United States*, 285 F.2d 567, (1960) the Fifth Circuit swept away all of the prior jurisprudence which required knowledge on the part of the defendant of the official character of the federal officer and followed the apostate ruling of another Circuit. In effect, these Circuits have overruled this Court, for *Pettibone v. United States*, supra, remains the law of the land. Without belaboring the point, the fact is that petitioner could not have been convicted in any but the Second, Fourth, Fifth and Ninth Circuits. The jurisprudence was set out in our original petition for writ of certiorari on pages 21, 22, and 23.

The denial of the petition for a writ of certiorari extinguishes petitioner's hopes that he might rely on this Court's ruling in *Pettibone vs. United States*, supra, over those decisions of the rebellious Circuits. *But*, the elimination of this hope raises a new issue:

18 U.S.C.A. 111 IS UNCONSTITUTIONAL AS NOW INTERPRETED

If the element of knowledge is not essential to the offense charged, 18 U.S.C.A. 111 is clearly unconstitutional, and violative of petitioner's rights under the Fifth, Sixth and Fourteenth Amendments of the Constitution of the United States. *Indeed it is the element of knowledge that rescues this statute from unconstitutionality,* for a criminal statute, in order to be valid and enforceable, must define the offense so specifically or accurately that anyone of ordinary intelligence will know when or whether his conduct is on one side or the other side of the border line between that which is and that which is not denounced as an offense against the law.

Our basic law insures that no one can be held accountable, or subject to criminal prosecution, for any act done by him unless and until that act has been denounced as a crime and has been punishable in a statute that defines the act sought to be denounced with such precision the person sought to be held accountable will know his conduct is such that it falls within the purview of the act intended to be prohibited.

The pertinent statute here makes it an offense to assault, resist, oppose, impede, intimidate, or interfere with a federal officer. It does not in any way define a specific action which is punishable, and leaves to the Courts and juries the task of interpreting and defining the series of verbs contained in the statute. It punishes all acts which in the estimation of the Court and jury

fall within their definition of the verbs, assault, resist, oppose, intimidate or interfere. Courts cannot, under the guise of interpretation, assume legislative functions, for if they could, there would be no certain or understandable rule and no uniform standard of conduct to guide the individual in ascertaining what acts it is his duty to avoid, doing violence not only to the constitutional requirement that the ascertainable standard of guilt by which all citizens are to be guided be fixed by the legislative branch of the government but also to the equal protection and due process clauses safeguarding against discrimination.

In *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, this Court ruled: "Congress alone has the power to define crimes against the United States. This power cannot be delegated either to the Courts or to the juries of this Country". The inquiry in Cohen, as here, is whether the statute constitutes a fixing by Congress of an ascertainable standard of guilt adequate to inform persons accused of the nature and cause of the accusation against them. See also *United States v. Reese*, 92 U.S. 214, 219-220; *United States vs. Brewer*, 139 U.S. 278, 288; *Todd v. United States*, 158 U.S. 278, 282.

Obviously the pertinent statute here was designed to protect federal officers in the performance of their duties and to federal jurisdiction over offenses against them. **The only reasonable and constitutional interpretation of the statute is that identified federal officers must be obeyed and are protected from violence in the performance of duty. The statute was not designed to punish the unknowing individual who refuses to obey a federal officer**

who is deliberately concealing his identity. As this Court said in *United States v. Reese*, 92 U.S. 214, 221: "It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the Courts to determine who could be rightfully detained, and who should be set at large."

If knowledge is not an essential element of this offense, it leaves to the Justice Department, the various United States Attorneys, the Courts and Juries of the land, and any of them, the right to define conduct which is punishable under this statute as well as who should or should not be punished. For example, a traffic accident and ensuing argument between a federal agent, where the other party refuses to allow the unidentified agent to leave the scene, a person who refuses to be taken into custody by an unidentified agent and resists arrest and detention, a person, be he criminal or not, who protects his home and family against the unlawful intrusion into his home by the unidentified agent and on and on, until the mind boggles with possible deportment which could be deemed criminal under the statute. *If knowledge of identity is not essential, Congress has indeed set a "net" so large that anyone coming in contact with federal agents is in jeopardy of indictment and conviction, particularly persons at odds with the government, as in the case of the petitioner.* Congress cannot validly enact a statute creating a federal crime relying on "common law crimes". The statute here does just that if the element of intent and knowledge are not essential.

Assault is a *statutory*, not common law crime, in every state in this country, and each state criminal code sets out the elements of the crime. The State of Louisiana, wherein the events of this case took place, has a statute protecting state and local police officers and it is identical to 18 U.S.C.A. 111, with the exception that knowledge of the official character of the victim is essential. The need of this element is more easily seen if an assault is not involved, but rather resistance, or opposition to an unidentified federal officer. What conduct constitutes opposition? impediment? resistance? intimidation? And how can anyone be held accountable under a special statute covering officials, if knowledge of the identity of the officer is not present.

One is permitted to oppose, impede and resist his fellow citizen with immunity as long as the nature of that conduct is not criminal. The uniformed policeman wears his badge and failure to heed this symbol of authority in an offense. His word is law on the street and can only be questioned before a Court. His identity and authority are apparent. But how, under the law, can a person be punished for failure to heed the disguised federal officer who assumes another role, and deliberately withholds his official identity. The uniform and badge deter resistance. The identification card of the F.B.I. agent has the same effect. Even the verbal admonition "Police Officer" would suffice. But to jail a man for intimidation of an F.B.I. agent who has *intentionally* withheld his identity is not only constitutionally invalid, it is also ludicrous and shameful. Congress did not intend such nonsense. 18 U.S.C.A. 111 is nothing more than a federal statute tracking the classic offense of "resisting arrest" punishable in all of the states.

Verbal exchanges between the unwary citizen and the federal agent in mufti became possible criminal conduct, to which there is no defense, if this statute is constitutional as now interpreted. How absurd.

No one is safe, unless of course, we assume that federal agents are infallible. And what a marvelous gimmick for the federal agents who have now been given by bad jurisprudence, created through dicta from the apostate Circuits which have abandoned the wisdom of this Court in *Pettibone v. United States,* supra, the right to go out and bust *anybody,* simply by withholding their identity and arousing a little resistance or opposition. Or, is a little resistance or opposition sufficient. Well, the statute doesn't say and the Courts and juries will have to guess if this conviction is allowed to stand. And that is our case..... The Constitution protects the people — yes, even Carlos Marcello — from this unhappy possibility.

Congress intended knowledge and intent essential elements. If not, the statute is clearly unconstitutional. In either case, the Marcello conviction must be reversed.

It is enough to say that had Marcello known Collins was an F.B.I. agent, Marcello would have respected his office, and the incident would not have occurred.

For the foregoing reasons, we submit that major constitutional questions are raised, involving all persons coming in contact with federal officers.

We respectfully pray that the rehearing should be granted, and the writ of certiorari granted.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

Of Counsel for Petitioner

CERTIFICATE OF SERVICE

I, Cecil M. Burglass, Jr. a member of the Bar of this Court in good standing and of counsel for petitioner in the above application for rehearing, do hereby certify that a copy of the foregoing petition for rehearing has been served upon the Solicitor General of the United States of America, United States Justice Department, Washington, D. C., by posting same, postage prepaid addressed to his respective office on the 3rd day of June, 1970.

Cecil M. Burglass, Jr.